

TRADE UNION DEMOCRACY AND THE LAW†

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The subject I have chosen is "Trade Union Democracy and the Law." I have therefore undertaken to submit to you some reflections on one of the most urgent and controversial aspects of modern democracy, the problem of distribution of power inside the unions. I shall not attempt to develop this problem in all its ramifications. Like other problems of power, it is a legal issue to a limited extent only, and it is the legal aspect alone which is my concern. I should first like to place the problem in context, in the framework of modern democratic society as a whole, and then approach it from the angle of the law, to see what contribution the law has made or could make towards its solution. It would be presumptuous for me to try to talk to you about your own controversies and your own law. I shall assume that it may be of interest to you to hear something about the contribution legislation and the courts have made to these matters in England. I will leave it to you to draw the necessary comparisons with your own Labor-Management Reporting and Disclosure Act of last year. There undoubtedly exists an enormous difference between your problems and ours, yet the common factor both in law and in fact is sufficiently great to lend some significance to English developments from an American point of view.

It would, I think, be very wrong, to view the problem of so-called trade union democracy in isolation. The distribution of power between the members of an organization, their elected organs, and the permanent office holders is not a specific trade union issue at all. Nor is it a specific trade union issue how far and by what means minorities should be protected, how far and by what means participation in democratic processes should be safeguarded for the benefit of the individual against discriminatory measures arising from group interest or prejudice, or how far and by what means the individual should be given some guarantee of access to the sources of information on the financial, electoral and other affairs of the body politic to which he belongs. All these problems arise in organizations of a non-political as well as of a political character, from the government of the country itself to the

† The Annual Address to the meeting of the Labor Relations Law Section of the American Bar Association, delivered on August 29, 1960, at the Convention of the American Bar Association in Washington D. C. and printed here by the kind permission of the Secretary of the Section.

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smallest village sports club, and from gigantic business corporations to the tiniest municipal authority.

Nevertheless, in our time these problems have assumed dimensions of which our ancestors were hardly able to dream. This is, of course, due to the increasing complexities of social techniques of management, finance and policy making, an important point in the trade union context. It is also due to the growth in sheer size of our political, commercial and social organizations, and to the need for centralization which arises therefrom. In other words, to use the pungent phrases which American authors produce so prolifically, it has something to do with the "managerial revolution" and something to do with the "curse of bigness." The estrangement of people from the handling of their own affairs, the temptation to forego the exercise of powers of self-government and to entrust the handling of collective business to the trained expert are things which in societies such as ours are almost inevitable. But in the long run they involve that abdication of the citizen, that half sceptical, half confident indifference towards public affairs which is the real danger to democracy. This mixture of "what can *I* do anyway?" and of "*they* know best, I can't be bothered"—this amalgam of feelings of impotence and of optimistic trustfulness is not a specific characteristic of trade unionism. It is perhaps the outcome of our urbanized civilization in which the living neighborhood relationship has given way to membership in anonymous organizations.

I hope I shall be forgiven for producing here these sociological truisms. I have mentioned these all too familiar phenomena because I should like, if I may, to link them with another characteristic of our Western societies which, I submit to you, is especially important in connection with trade unions. Democracy, as we all know, has its historical roots to a large extent in the needs of communities which fight for their existence against forces of nature, or against political enemies, or against economic and social adversaries. To keep democracy alive in a body which is no longer struggling for its existence, which is "recognized" as a participant in well regulated procedures is no easy task. Am I exaggerating when I say that the problem of trade union democracy as a social problem derives its poignancy to no small extent from the conditions of a high level of employment and, to use another one of your admirable phrases, of an "affluent society"?

Suppose for a moment I am right in saying that the estrangement between union members and union affairs can be explained in terms of social psychology. It surely follows that whatever contribution the law can make must be very limited indeed. Nevertheless I suggest to you that this question of union democracy has a much deeper political and therefore potentially legal significance than the superficially compar-

able problem of the so-called "shareholders' democracy," and the question of how to reconcile the participation rights of investors with the needs of efficient business management. The rights and duties of the citizen as a union member have a much greater impact on the totality of his existence than his rights and duties as an investor. If he has the necessary funds or credit he may invest in any number of companies (and if he is wise he will spread his interest) but he can have only one job. He may choose not to invest in corporate enterprise, but rather to buy real estate or government bonds or paintings. Yet how many people have any choice whether or not to work for wages? The job, then, is a far more intimate element of a man's life than his investments. Union membership is often a condition for getting and holding a job, but whether it is or not, what the union is and does determines in a decisive way the mode of its members' existence. For this reason trade unions are more comparable to political than to any other social organization. Also for this reason, labor law in general and trade union law in particular concern the employee in a human way, but the employer only in a business way. Trade union democracy has more to do with political democracy than with shareholders' rights or with the organization of clubs. This is what engages our attention and our obligation as citizens and as lawyers.

Nor is this all. A modern democracy is as unthinkable without trade unions as it is without political parties. In any realistic sense unions are a necessary part of a democratic constitution, and this, I think, for two main reasons. In the first place they have a very special significance as pressure groups. This is no less true in Britain than it is in the United States, although, owing to the profound difference between a Presidential and a Parliamentary democracy, the pressure may be applied at different points. It is certainly true of Britain, and I suspect to some extent also true of this country, that one of the most important functions of a trade union in a democracy is to operate as a pressure group inside a political party, and, what is more, to be the channel through which the worker can give support, above all financial support, to the party which he feels represents his interests. This is one reason why unions are necessary elements in democratic constitutions. The other is that they are organs of legislation. Collective bargaining is a form of legislation, and in this country as in Britain it is the principal form of law making in the matters relating to the way most people earn their livelihood. Even in countries such as France or Germany where governmental legislation is so much more important in labor relations, collective bargaining is an essential factor in determining the workers' rights and duties. The unions are organs of legislation, quite irrespective of whether a law such as yours makes them "statutory bargaining

representatives" of all workers in the bargaining unit irrespective of membership, or whether, as in Britain and on the European Continent, they represent only their members. Nor does it matter whether the law enforces collective agreements through courts or administrative agencies. Whether the guarantees of union participation in the legislative process are legal, as in the United States, or political, as they primarily are in Britain, the unions are, as Chief Justice Stone said more than 15 years ago:¹

clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty to protect those rights.

As pressure groups then, and as law making agencies the unions occupy a unique position in our societies. This gives a unique importance to the processes through which office holders are selected, decisions made, minorities protected, and individual participation rights safeguarded inside the unions. To this extent, their internal affairs are today different in kind and not just in degree from those of other voluntary associations. No union official has a *locus standi* in the forum of public opinion to argue that internal union democracy is exclusively the union's private affair. It is everybody's business, even if the union does not wield full control over jobs.

Here however we face our dilemma. It is all very well to say that union affairs are public affairs, that union government is in any but a narrowly legalistic sense public government, and it is all very well to lay stress on the freedom of the individual and on minority rights inside unions, and to talk about them in language derived from the vocabulary of constitutional law. There is, however, another side of the matter, and a very important side. The unions represent interests; they are bargaining bodies, and, if need be, fighting organizations. The right and the power to strike is as necessary a part of a democratic constitution as the right to bargain collectively from which it is inseparable. Moreover, however much the unions in this country, as in Britain, may have achieved recognition as bargaining partners and as participants in governmental processes, their legitimate operations (and in certain areas even now their very existence) are under attack by social adversaries, be they employers or rival unions. Civil liberties are said to be subject to limitations where their exercise is a "clear and present danger" to the safety of a community which lives in a hostile international environment. Is there no analogy here? It is only too

¹ *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 198 (1944).

clear that the leading cases in which the English courts have developed the doctrines of protection of democratic and minority rights inside the unions have sometimes been examples of outside adversaries of the unions utilizing (and financing) minority grievances inside the unions. One of the provisions of the Landrum-Griffin Act (the second proviso to section 101(a)(4)), shows that there is little here that you can learn from us. Perhaps to some extent these enemies of the unions were, like Goethe's Mephistopheles, part of that force which always desires evil and always creates good: they may have wanted to destroy the unions and in the process they may have helped to consolidate union democracy. Even so, we ought to be on our guard. Trade unions exercise public functions, but they cannot exercise them unless they remain free and autonomous. In a democratic society they are *not* part of the government. They represent the interest of the workers, and in so doing they exercise a public function. That the representation of private interest (and, if need be, the uncompromising fight for private interest), is a vital public function is, after all, an idea with which we, as lawyers, can be expected to have some sympathy. The problem of the constitutional or legal intervention inside the unions for the protection of union democracy is in some ways analogous to the problem of legal regulation of the activities and of the conduct of lawyers. In both cases the dilemma between protecting standards of behavior and protecting autonomy and self-regulation is obvious. In both cases it arises from the dialectical situation of persons and of institutions which exercise their *public* function by *not* being part of the government and by representing *private* interests. One *can* transform unions into part of the governmental machinery: this is the way of totalitarian constitutions. We must beware lest by overemphasizing the need for public legal guarantees of union democracy and by forcing upon the unions a democratic structure we destroy their democratic autonomy.

In 1957 when I had the honor of addressing the Labor Relations Law Section of the American Bar Association in London, I pointed out that in Britain the lawyer's role in industrial relations is insignificant compared to what it is in this country. If I may formulate a similar generalization with regard to domestic trade union affairs, it would be that in Britain the general tendency is in the direction of leaving as much as possible, far more than in the United States, to the establishment of standards by the unions themselves, and to their enforcement through public opinion and social pressure. The law intervenes mainly to enforce the rules the unions have made for themselves. Much of what I found in the Landrum-Griffin Act, especially your "Bill of Rights" and your provisions on elections, I would in England find expressed or implied in union constitutions. Other things, such as the

publicity to be given to the constitutions of the unions and to their accounts, I would find in the law. Still other things in your statute I would not find at all because they are not needed. On the whole however our society is very homogeneous and, on the other hand, very pluralistic and deeply devoted to the medieval tradition of professional self-regulation and professional autonomy. Hence the role of legislation of the courts and of the legal profession in these matters is very much smaller than in your country where social conflicts as well as political issues are so much more likely to be articulated as legal problems, largely as a result of tradition and national temperament. Clearly the law has been and is more important as a source of standards and as a regulator of internal union relations in the United States than in Britain. Yet on both sides of the Atlantic the need for preserving the self-regulating autonomy of the unions is urgent, and on both sides of the Atlantic, union democracy appears to be mainly threatened by deep-rooted social and psychological forces. We are, I think, all convinced that the law may be able to do *something* but that we cannot do *much* to establish or to enforce democratic standards if the rank and file of union members are apathetic towards the decision making process inside the union. This is your background and ours, and it is the background against which I should now like to say a word or two about the legal situation in Britain.

In this I shall mainly concentrate on three problems which are much on your minds as evidenced by your legislation, cases and literature on the subject: *publicity*, that is "communication" or access to information, secondly, *protection of minorities*, and lastly, *protection of the union constitution* and especially control of elections. I shall say little or nothing about two kindred problems to which you have also devoted a great deal of attention. One is *admission to membership* because it has not as yet proved a real issue in our more homogeneous society; the other one is *discipline* and *expulsion* which is an enormous issue in Britain but which has been so widely discussed in recent years that you are probably familiar with the development in our country.

May I then in the first place touch upon the problems of publicity with which you have now dealt in section 201 of the new act. For almost ninety years we have had a system of union registration which was introduced in 1871 by the Trade Union Act of that year. Registration under the 1871 act is purely voluntary, and in this respect quite different from the registration systems in some other parts of the world, including some of the British territories outside the United Kingdom. A trade union in Britain has the full status of a trade union without being registered; it has full factual collective bargaining powers, *locus standi* before arbitration boards and government departments, quite

irrespective of registration. It also has, whether registered or not, the essential legal immunities of a trade union under British law, such as immunity from suit in tort² and immunity from certain claims of a domestic nature, especially from direct claims for benefit.³ The privileges which registration confers are useful without being vital. There is a very limited income tax privilege,⁴ not particularly important in practice, and there are a number of conveyancing facilities and other advantages in connection with the technicalities of property administration;⁵ there are also summary remedies against fraudulent misappropriation of union funds and other property.⁶ A registered union also has the advantage that it can sue in court in its own name, rather than in the name of its trustees or by a representative action,⁷ and the corresponding disadvantage (if such it is) that it can be sued in contract in its own name. The comparatively minor privileges I have mentioned, and a few others,⁸ cannot explain why practically all the larger unions of employees and workers have in fact obtained registration so that today roughly eight out of nine union members belong to registered unions.

It may sound paradoxical, but I am convinced that it is true that the unions register not because of these insignificant privileges, but on the contrary because of the very significant obligations registration imposes upon them. As my colleague B. C. Roberts says in his book, *Trade Union Government*,⁹ the motive is the "desire of trade unionists to conform to the standards laid down" in the statute, but of course they could comply with these standards voluntarily without registration. However, I think what they desire is the legal *compulsion* to comply, the guarantee of compliance, and the official and authentic publicity given to such compliance. Certain elementary principles of internal democracy are thus placed beyond controversy. No question can be asked as to whether accounts should be published and what accounts and how, and whether they should be audited, and how the funds are to be invested, and whether the members can inspect the books, and how office holders are appointed or elected, for all this—accounts, investment, inspection, elections and the rest—is regulated

² Trade Disputes Act, 1906, 6 Edw. 7, c. 47, § 4.

³ Trade Union Act, 1871, 34-35 Vict., c. 31, § 4.

⁴ Income Tax Act, 1952, 15-16 Geo. 6 & 1 Eliz. 2, c. 10, §§ 440-441.

⁵ Trade Union Act, 1871, 34-35 Vict., c. 31, §§ 7, 8.

⁶ Trade Union Act, 1871, 34-35 Vict., c. 31, § 12.

⁷ *National Union of General and Municipal Workers v. Gillian*, [1946] K.B. 81. For the union's liability to be sued in contract, see *Bonsor v. Musicians' Union*, [1956] A.C. 104.

⁸ For these, see Citrine, *Trade Union Law* 126-28 (2d ed. 1960).

⁹ Roberts, *Trade Union Government and Administration in Great Britain* 18 (1957).

either by the statute itself, by regulations, or overwhelmingly by the union's rules which are public property, having been filed at the Registrar's office. Publicity of constitutional and financial procedures is, I suppose, one of the cornerstones of what we call democracy, and to some extent registration guarantees not only this publicity itself, but also that no one can accuse the union leaders of having tried to avoid it. It does a lot, I think, to remove friction and to smooth the day to day lives of the unions, and this must be one of the main causes why the unions seek registration. Some may feel that, whatever you may think about your new act in general, what I have said may perhaps supply an argument for the publicity provisions in section 201.

One should not on the other hand exaggerate the effect of registration on union democracy in Britain. The Registrar's powers are strictly limited, and it has been argued, wrongly in some respects and perhaps rightly in others, that they should be enlarged. A registered union must have a written constitution in the form of rules, and these must make provision for the appointment of trustees¹⁰ in whom all union property vests.¹¹ The trustees are always union members. These rules must also provide for a number of other matters, such as conditions for benefit, investment of funds, periodical audit of accounts, inspection of books, union objects, etc. The rules can be inspected by anyone at the Registrar's office, and each union member is entitled to a copy on payment of a small fee. If the Registrar has received an application for registration by a body of persons which complies with the act, and rules which are in order, and if all formalities are complied with, he *must* register the union. He has no discretion, and if he refuses, mandamus lies against him. He cannot reject the rules, for example, because he feels that the democratic rights of members are not sufficiently safeguarded. He receives the rules and gives them publicity, but if they comply with the formal requirements of the law, he has no power to approve or to disapprove. The British registration procedure is consequently a guarantee of publicity and little more. There is very little in our law to correspond to the titles I and IV of your new statute.

A registered union must give full publicity to its constitution and all amendments,¹² and also to the names of its officers.¹³ Further, as I have indicated, the law compels a registered union to observe certain standards of financial administration, to transmit to the Registrar and thus to the public an annual return including a balance sheet as well as a revenue and expenditure account, with detailed statements of the

¹⁰ Trade Union Act, 1871, 34-35 Vict., c. 31, § 14(1), First Schedule No. 4.

¹¹ Trade Union Act, 1871, 34-35 Vict., c. 31, § 8.

¹² Trade Union Act, 1871, 34-35 Vict., c. 31 §§ 13(1), 16.

¹³ *Ibid.*

various heads of expenditure, all in the form prescribed by the Registrar and with the particulars demanded by him.¹⁴ Each member is entitled to a copy of the accounts free of charge¹⁵ and is entitled to inspect the books, a right thought to include permission to make copies of extracts from the books. For most union members this would not be much of a benefit if they did not also have a legally protected opportunity of using the services of an expert accountant. The statute is silent on this, but the courts have decided that the right to inspect includes the right to have such assistance.¹⁶ I think I am right in saying that here for once we go further than you do, because your section 201(c) seems to me to say that the members can inspect the books only "for just cause." I do not feel that this would go down well with British trade unionists. Again, in the matter of finance as in the matter of democratic participation rights, the institutional guarantee of publicity is all that our law provides. The Registrar enforces it, but he has no right to order an inquiry. All he does is to ensure that the published accounts are in order as a matter of form, but I believe this publicity itself is of great value in removing distrust. These provisions were enacted in 1871 at a time when trade union funds were still occasionally in danger of being robbed by unfaithful trade union officials; there were some well known scandals in the 1860's. The facts seem to show that these publicity provisions have had their desired effect.

From what I have said you may arrive at too low an estimate of the importance of the Registrar. His legal powers are mainly formal, but his influence in practice is greater than the bare wording of the statute suggests. Like the monarch according to Bagehot, he can neither enforce nor can he prevent a policy, but like Bagehot's king he can, and by all accounts he does, warn and encourage. It is remarkable for instance, that there are only few examples of union rules which give a power to expel without a proper hearing. This would probably be against "natural justice," but there has never been an actual decision on the point, and the paucity of such clauses may well be ascribed to the silent and informal but quite effective influence of the Registrar and his officers. To some extent this is our equivalent of your Bill of Rights and election provisions.

Let me now turn to the question of protecting minorities. Here the provisions of the 1871 act do not go very far. All they do is to insure that a dissatisfied minority has at least a chance of knowing what its rights are. Moreover, the courts have indirectly strengthened

¹⁴ Trade Union Act, 1871, 34-35 Vict., c. 31, § 16.

¹⁵ *Ibid.*

¹⁶ *Dodd v. Amalgamated Marine Workers' Union*, [1924] 1 Ch. 116; *Norey v. Keep*, [1909] 1 Ch. 561.

the hands of minorities threatened with disciplinary action by developing and greatly enlarging the rights and remedies available in the case of wrongful expulsion, by insisting that any hearing should be fair and impartial, that the rules should be strictly observed, and that the court has the power to interpret their meaning,¹⁷ and especially by holding over the union the threat of heavy damages.¹⁸

This problem of minorities in Britain however has certain aspects which may be different from those familiar to you. Policy making inside the unions is probably more centralized in some respects in Britain than in the United States, owing not only to the smaller size of the country but also to the prevalence of industry wide bargaining with employers' associations. The central union administration is generally more cautious than the branch (which is our word for "local"). Domestic union conflicts frequently arise from a feeling among the rank and file that the leaders are not sufficiently militant. I recall a dock strike in 1951 when this was made more explicit than usual. There the minority leaders, the members of the unofficial "strike committee," proclaimed to the world that one of their objects was "to ginger up the union." This was the Transport and General Workers' Union, the largest British trade union with more than 1¼ million members, and known for its highly centralized and efficient administration. The frequency of wildcat strikes in Britain has, I think, been exaggerated, but they are not insignificant and they have something to do with disgruntled minorities whose grievances are not always given an outlet by very cautious and highly responsible union leaders.

It is my personal opinion that those who argue in favor of a compulsory ballot before each strike being written into each union constitution by force of law and in favor of supervision of such ballots by the Registrar, completely miss the point. The shoe is on the other foot, in Britain, and I gather here in the United States as well. The union leaders, whether elected or appointed, have for years often been a kind of buffer or windscreen, protecting the nation and its economy from the more militant union minorities. If anyone needs protection in the democratic sense, it would be these militants, and not the unfortunate few who, though opposed to a strike, are compelled to take part in it. I am not saying they are an extinct species (sometimes they even appear as plaintiffs in fascinating court cases¹⁹), but by and large they

¹⁷ *Amalgated Soc'y of Carpenters v. Braithwaite*, [1922] 2 A.C. 440; *Lee v. Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329. For an explanation on this, see Grunfeld, "Trade Unions and the Individual: A Study of Recent Developments in England," 7 *Journal of Public Law* 289, 298-303 (1958). This is the best up-to-date presentation of English domestic trade union law.

¹⁸ *Bonsor v. Musicians' Union*, *supra* note 7.

¹⁹ *E.g.*, *Huntley v. Thornton*, [1957] 1 Weekly L.R. 321.

exist mainly in the imagination of sentimental 19th Century poets and not quite disinterested 20th Century politicians.

In so far as our problem is one of minority rights in matters of collective bargaining and strike policy, the best the law can do in Britain at any rate is nothing at all. But there are other problems. Race relations have not thus far troubled internal union affairs in Britain. I am not saying we are immune against the virus of race discrimination, but union policies fortunately have so far been in this matter clear and clean, and strictly opposed to color bars and similar abuses. Our minority problem is political rather than racial, and here we are coming back to the actual law.

The British trade unions are financially and politically closely connected with the Labour Party. They helped to establish it and have ever since strongly influenced its policy. It has been and is financially dependent on the unions to a very large extent. This relationship between the unions and politics is inherent in the British system of Cabinet Government. There can be no cabinet system without strict party discipline. Decisions on policy are largely made *inside* the parties, both on the government and on the opposition side, and generally speaking are carried out loyally by Members of Parliament. Hence, to be effective, pressure groups have got to work inside the parties. Trade unions everywhere have always tried to exercise political influence. In the 19th Century, as Sidney and Beatrice Webb have shown, they did it through the method familiar to you of punishing their enemies and rewarding their friends.²⁰ Since the creation of the Labour Party at the beginning of the 20th Century they have adopted the method of working with and through that party. There is nothing uncommon and nothing sinister in this; it is a method in no way different from that used by financial and commercial interests of all sorts. The difference is, however, that what mass organizations such as trade unions do is (and should be) done in the full light of publicity, whereas the more subtle influence exercised by those few who control large financial resources is commonly exercised in a confidential atmosphere remote from the sordid gaze of indiscreet eyes. In short, to deprive trade unions in Britain of the right to use union funds for political purposes would have been incompatible with a democratic constitution.

This, however, is the point where our minority problem begins. Over large areas, in Britain as in the United States, union membership is only nominally voluntary. It is a characteristic of a highly developed union movement that, with or without formal union security arrange-

²⁰ S. and B. Webb, *History of Trade Unionism*, Ch. V; *Industrial Democracy*, Part II, Ch. 4 (1920).

ments, it tends to become socially compulsory. What, then, about workers who, while disagreeing with the political aims pursued by the union, are nevertheless its members by force of circumstance rather than by choice?

In the absence of a bill of rights and a code of election standards, it is here and only here that our statutes have formulated explicit and very stringent principles for the protection of union minorities. In 1909 the courts decided that a registered union (the same was subsequently decided in the case of an unregistered union²¹) was not entitled to apply any part of its funds to any purpose, except one of those expressly enumerated as trade union objects in the statutes, which means broadly activities in labor relations. Any violation of this prohibition was held to be an *ultra vires* act. The decision in *Amalgamated Soc'y of Ry. Servants v. Osborne*²² deprived the unions of all power to participate in political or educational activities or even to publish a newspaper or other printed material. It was plainly incompatible with the democratic working of the Parliamentary system, and, quite apart from its legal aspects, based on a profound misunderstanding of the place of unions in society. It was on the other hand, however, a blow struck for the protection of unpopular minorities inside unions. This we can admit, however much one may suspect the motives of those who financed the Trojan horse campaign of the plaintiff. Looking at the *Osborne* case after half a century, one feels that, untenable as it was, it did bring home the lesson that union democracy requires some protection for political minorities.

The Trade Union Act of 1913 was an attempt, largely successful, made by the Liberal and Labour majority of that day to find a compromise between the need for democratic participation of the unions in the national affairs and the need for a measure of democracy in their internal affairs, between democracy in the macrocosm of the state and in the microcosm of the unions. The *ultra vires* rule was abolished, and the unions' power to engage in all lawful activities authorized by their own constitutions was restored. But they cannot spend any money for political purposes out of their general funds. In order to make such expenditures they must create a separate political fund, and to do that they have to have a secret ballot and special rules for the administration of the political fund whether they are registered or not. The political fund rules must be approved, and not just be received and published by the Registrar. To be approved, they must contain stringent provisions for the protection of dissenters. Dissenters can as we put it, "contract out," which means that by signing an appropriate form, they

²¹ *Wilson v. Scottish Typographical Ass'n*, 1912 Sess. Cas. 534 (Sess. Ct.).

²² [1910] A.C. 87.

can effectively declare their unwillingness to contribute to the political fund. Those who have done this must not in any way suffer any disadvantage or discrimination regarding benefits or rights to participate in elections or in the administration of the union, except that of course they may be excluded from the management of the political fund itself.

Here, then, we have a pattern of legislative protection of democratic participation rights. True, it applies only to the limited area of political dissent, but anyone interested in finding such patterns might want to look at this legislation (with the details of which I will not trouble here, except to say that willingness to contribute to the political fund must not be made a condition of admission). I would however like to give you a case to show how seriously this minority protection is taken in practice. This case, *Birch v. National Union of Railwaymen*,²³ was decided by a Chancery judge in 1950. The Political Fund Rules of the National Union of Railwaymen (NUR) which had been approved by the Registrar provided that a member who had contracted out should not be subject to any disadvantage or disability:

except that such member shall take no part in the control or management of the political fund of the union, and shall be ineligible to occupy any office or representative position *involving* such control or management.

The plaintiff who had contracted out was elected chairman of his branch, and as such he was concerned with the general as well as the political fund of the branch (each branch is a union for this purpose), and he was promptly told by the General Secretary that he was ineligible because the branch chairmanship *involved* the control and management of the political fund. This interpretation was not questioned by the judge, but he held, rightly in my opinion, that, as it stood, the NUR's political fund rule was (though approved by the Registrar) against the act and void, and that consequently the NUR had no political fund and could not spend money for political purposes. The NUR did not appeal but changed its rules, which was wiser and considerably cheaper. What the decision means is that a union cannot, by combining general union management with political fund management, deprive a dissenting minority of its legally protected equality of opportunity to participate in union affairs. This protection however extends only to non-contributors to the political fund as such. It does not extend to political minorities whose members contribute. Thus the act did not stand in the way of those unions which decided to exclude certain political minorities from union office, as the Transport and General Workers Union did a few years ago with regard to Fascists and to Communists.

²³ [1950] Ch. 602.

In conclusion I would like to add a few observations on the policy of the courts to insist upon the strict observance of the union constitutions generally, and especially in connection with elections. This policy has become explicit, largely since the early years of this century, predominantly in expulsion cases and in connection with the administration of union funds. The courts may through injunctions restrain any spending of union money which is not strictly within the union constitution. The publicity of union expenditure to which I have referred makes it comparatively easy to see how union money is spent, and since the famous decision in 1905 of the House of Lords in *Yorkshire Miners Ass'n v. Howden*,²⁴ it has been clear that each member can ask the court for an injunction. This was another one of those cases where a Trojan Horse, or, if you like, a Trade Union Hampden, was helped from outside to establish minority rights. The union was by injunction restrained from spending money on a strike without having held the ballot required by the rules. Such negative control by the courts is in fact often a guarantee of constitutional procedure in matters other than financial. The courts have intervened to prevent secessions of branches.²⁵ This was possible because by statute²⁶ the branch funds can be made to vest, and normally do vest, in the trustees of the central union, and the central trustees can thus get an injunction to prevent the branch officials from dissipating the branch funds or from handing them over to a rival union. Conversely, the courts have protected union minorities in matters of amalgamations.²⁷ Union mergers are governed by very intricate statutes²⁸ and normally also by union rules for the protection of dissenting minorities. The ultimate control of the purse strings by the courts is some guarantee that such provisions are observed.

Not all court intervention to secure the observance of constitutional rules has, however, been through the backdoor of financial control. Thus, where a union wishes to change its constitution it must adhere to the formalities provided in the constitution, and any attempt by the executive to expand its power by riding roughshod over these formalities will, even if acquiesced in by the membership, be suppressed by the courts. This happened during the War when a Scottish trade

²⁴ [1905] A.C. 256.

²⁵ [1909] 2 Ch. 148.

²⁶ Trade Union Amendment Act, 1876, 39-40 Vict., c. 22, § 3.

²⁷ *Wolfe v. Matthews*, 21 Ch.D. 194 (1882); *Booth v. Amalgamated Marine Workers' Union*, [1926] Ch. 904.

²⁸ Trade Union Amendment Act, 1876, 39-40 Vict., c. 22, § 12; Trade Union (Amalgamation) Act, 1917, 7-8 Geo. 5, c. 24. Societies (Miscellaneous Provisions) Act, 1940, § 6.

union started to recruit temporary members²⁹ in the docks, and made them sign a piece of paper that they were members for the duration only and could be required at any time to forfeit their membership after the end of hostilities—a pretty dangerous weapon in the hand of the executive. The union constitution said nothing about temporary membership, and the House of Lords eventually made a declaration that the temporary members had been recruited *ultra vires* and had never become members at all. This occurred years later in 1952. You can see that the courts will not tolerate the development of what you may call “conventions” of union institutions created against the clear wording of the written constitution or alongside it by acquiescence. This was even more vividly illustrated in a case before the Court of Appeal in 1950³⁰ where a large craft union, the National Union of Vehicle Builders, had violated its own rule by which dues could be raised only through a ballot, at which a two-thirds vote in favor was needed. Such a rule, it seems to me, goes further even than your new act does in this respect. This rule had fallen into oblivion, as the members had for years acquiesced in increased dues without a ballot. But eventually a minority objected, and the court held the increase to be *ultra vires* and void. In a third case, in 1955,³¹ the Musicians’ Union, to meet an emergency, intended to raise a general levy of 1 shilling a week for six months, but exempted members earning less than 10 pounds a week. The Court of Appeal restrained the union committee from proceeding with the proposal on the ground that in substance it amounted to a levy on a section of the membership, an inequality not warranted by the rules. A very formalistic application of a kind of equal protection principle, you might say, but a good illustration all the same.

This policy of enforcing the union constitution is however subject to the opposite policy of protecting the autonomy of the union and of not permitting unnecessary appeals to the courts from internal union decisions if the internal mechanism of the union would have provided a remedy. The courts have borrowed from company law the rule which prevents a shareholder from questioning in court the validity of any action of the company which could have been approved by a simple majority of the shareholders, provided what he was trying to assert was the right of the company and not a right vested in him as an individual.³² If it is within the power of the majority to sanction the

²⁹ *Martin v. Scottish Transport and General Workers Union*, [1952] 1 All E.R. 691 (M.L.).

³⁰ *Edwards v. Halliwell*, [1950] 2 All E.R. 1064 (C.A.).

³¹ *O'Reilly v. Musicians' Unions*, [1955] C.L.Y. 2794.

³² This is known in England as the Rule in *Foss v. Harbottle*, 2 Hare. 461, 67 Eng. Rep. 189 (1843). For an explanation, see Gower, *Modern Company Law*, Ch. 25 (2d ed. 1957). For its application to trade union law, see *Cotter v. National Union of Seamen*, [1929] 2 Ch. 58.

holding of a meeting which has not been properly convened, no member can complain about the meeting having been held, and similarly where an issue has been irregularly placed on the agenda. But this can never cover acts which are *ultra vires*. The borderline between intervention and non-intervention may be technically a matter of intricate reasoning; it is in truth a compromise between autonomy and minority rights, an uneasy compromise of policies.

All this however is not nearly as important as the proper conduct of elections, but the difficulty here, as I see it, is not so much on the side of the law as on that of evidence. The courts can and do undoubtedly intervene to see that all those entitled to vote are given an opportunity of doing so, that the prescribed ballots are held and that the votes are counted properly. They can and do also enforce the right of every eligible member to be considered as a candidate for union office and to have his campaign literature properly distributed by the union and submitted to the members. Any election in violation of the union rules is void and the court will issue the necessary declarations and injunctions which has happened more than once.³³ But what does that mean in practice if you cannot prove your facts? As I have said, in matters of finance our law does what it can to put the facts at the disposal of the members, and dubious financial practices are hardly a live issue today in British unionism. But when it comes to tampering with votes, it may be difficult for a union member to prove his case, if he faces a hostile executive determined to conceal the facts. At the moment we are very much concerned with the affairs of the Electrical Trades Union (ETU) whose General Secretary, a key official, was some time ago re-elected by a small majority. The election was hotly disputed (the re-elected General Secretary is a Communist). It has been widely alleged, whether rightly or wrongly I cannot say, that this election was rigged. The matter is now *sub judice*, an action for an injunction having been brought by the defeated candidate in the High Court. There have been a number of preliminary skirmishes. One of them was last May³⁴ when a candidate for the office of Assistant General Secretary of the union got an injunction preventing the union from holding the election without having circulated the plaintiff's election statement unadulterated as submitted by him. The right of the candidate which the court enforced was, of course, based on the con-

³³ See *e.g.*, *Watson v. Smith*, [1941] 2 All E.R. 725 (Ch. Div.), which arose from a dispute about the interpretation of the constitution of the Amalgamated Engineering Union. But here, too, union autonomy places a limit to the intervention of the courts. For a highly instructive case, see *Goode v. National Union of Mineworkers*, [1959] C.L.Y. 3352.

³⁴ *Chappel v. Electrical Trades Union*, [1960] 5 C.L. 378; *London Times*, May 5, 1960. See also, *Cannon v. Haxell*, *London Times*, July 29, 1960.

stitution of the union, and not, as might now be the case in the United States, on a statute.

These matters have led to what may be called a certain self-questioning among the unions. There has been an open conflict between the ETU and the General Council of the Trades Union Congress (TUC) about these elections. The TUC, and incidentally not only the TUC, suggested that the leading men in the ETU bring actions for libel or slander against those who in the press, on the radio, and on television had accused them of fraudulent manipulation of these elections, but no such action has been brought. No wonder that the question has been raised whether the courts and whether the Registrar have sufficient power over union elections. The Trades Union Congress cannot really do very much; the ultimate sanction it wields is to disaffiliate the offending union. But what is the good of that? Disaffiliation would not impair the collective bargaining power of the union, and, given the fundamental fact that British trade unions very frequently bargain jointly with other unions, the other unions would have to co-operate with the disaffiliated union, co-operate in collective bargaining, on joint industrial councils, in statutory wages councils, government committees, and all the rest. Of course, all this might be different if the TUC encouraged the formation of a rival union as was done, I think, some years ago by the CIO on a similar occasion. But there is little our unions hate more than the rivalry of unions operating in the same field, and rightly so, and for the TUC to promote what many work-people would call a "breakaway" (which means a secession and is one of the dirtiest words in the British trade union vocabulary) is highly improbable. There remains therefore the possibility of a change in the law so as to strengthen the hand of the Registrar, by giving him powers of investigation which he does not now possess, and equally important, powers to inspect documents referring to elections. These matters are now under public discussion, and speaking for myself, I should say that in this area the Landrum-Griffin Act might give food for the thoughts of many of us. Such things, *e.g.*, as your provisions on the right of a candidate to have an observer at the polls and at the counting of the ballots (section 401(c)), perhaps also those on the removal of elected officers (section 401(h)), and in general the powers of investigation you have now given to the Secretary of Labor (section 601), are matters which we cannot imitate, of course, but which we ought to ponder. Legal institutions are not exportable, not even between common law countries, but fortunately legal ideas are not patentable either. We cannot copy your institutions and you cannot copy ours. But we can learn from each other. That, I take it, is the object of a gathering such as this, and to this worthy object I hope that I have made some small contribution.